

# THE INTERIM

MARCH 2004

HELENA, MONTANA

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## PER DIEM PAYMENTS TO LEGISLATORS -- TAX CONSIDERATIONS

*The information below is intended to assist legislators and their tax preparers in handling legislative per diem payments. Legislators should consult with their income tax preparers for specific requirements relating to individual circumstances.*

**General Rules...**All legislative per diem payments, not exceeding the amount allowed by federal law, made to legislators living more than 50 miles from the Capitol building are reimbursements made under an accountable plan, are not taxable income of the legislator, and are not subject to withholding or reporting. The difference between the amount allowed by federal law for reimbursement and the actual amount of per diem paid is taxable income.

Legislative per diem payments made to legislators who do not live in Helena but who live within 50 miles of the Capitol building are not substantiated reimbursements and are thus reported as income. Withholding is made against these payments. All legislative lodging and meal expenses actually incurred by a non-Helena legislator living within 50 miles of the Capitol building are unreimbursed expenses and, subject to certain limitations, may be a miscellaneous items deduction by the legislator.

Legislative per diem payments made to legislators who reside in Helena are reported as income and are subject to withholding. The legislator may not claim meal and lodging expenses incurred in Helena.

**Accountable Plan...**All legislative per diem payments made to a legislator whose home is more than 50 miles from the Capitol building are employee reimbursements under an accountable plan for the following reasons:

(1) Under 26 U.S.C. 162(h), a legislator is considered to have substantiated living expenses if the legislator's place of residence is more than 50 miles from the Capitol building.

(2) Federal law provides one type of accountable plan for when the employee's "lodging plus meals and incidental expenses" per diem reimbursement is substantiated (26 U.S.C. 62(a)(2)(A), 26 CFR 1.62-2(c)(2)).

**Excess Per Diem Payment...**The amount considered substantiated under federal law cannot exceed the amount payable to federal employees for per diem within the U.S. For Montana, the applicable reimbursement rate, set forth in 41 CFR Ch. 301 App. A, is \$86 a day. The per diem payment made to legislators is \$90.31 per legislative day, set according to 5-2-301(4), MCA.

Reimbursements paid "under an accountable plan are excluded from the employee's gross income, are not reported as wages or other compensation on the employee's Form W-2, and are exempt from the withholding and payment of employment taxes (Federal Insurance Contributions Act (FICA), Federal Unemployment Tax Act (FUTA). . .)". (26 CFR 1.62-2(c)(4)).

Montana legislators were paid for 110 legislative days at \$90.31 per day, for a total of \$9,934.10. Section 26 U.S.C. 162(h)(2)(A) considers per diem substantiated during legislative session breaks of up to 4 days. Montana law provides for reimbursement only on breaks of 3 days. There was one four-day break in which state per diem was not paid for one day (March 4, 2003) but was allowable under federal law. Federal law then allows substantiation of 111 days at \$86 a day for a total of \$9,546. A total of \$388.10 (\$9,934.10 - \$9,546) was paid in excess of substantiated business expenses.

Therefore, although all legislators living more than 50 miles from the Capitol building do not have their per diem payments reported on their W-2 Forms, they must pay taxes on the \$388.10 that is in excess of the amount considered substantiated under federal law.

**Helena Area Legislators...**Under 26 U.S.C 162(h)(4), the special provisions allowing use of the federal per diem rate do not apply to legislators living within 50 miles of the Capitol building. Therefore, those legislators must follow the provisions of 26 U.S.C. 274(d) and must specifically substantiate all lodging and meal expenses. Because 26 U.S.C. 274(d) requires out-of-town travel before a person can claim lodging and meal expenses, a legislator who lives in Helena cannot claim any meal or travel expenses for session activities occurring within Helena.

If you have questions about the information above, contact Lee Heiman, Legislative Services Division, at (406) 444-3064 or lheiman@mt.gov.

## ENERGY AND TELECOMMUNICATIONS COMMITTEE

**Committee to Hold March Meeting in Helena...**The Energy and Telecommunications Interim Committee will meet March 25 in Room 102 of the state

Capitol. The meeting is expected to last all day; however, the starting time has not been set. Committee members agreed to tackle the following major topics:

- Energy efficiency. Staff will prepare and review a white paper and invite an expert from the Northwest Power and Conservation Council to speak.
- Comments received on a draft Universal System Benefits Program Workbook that has been circulating for review and comment since late November. (As noted in the last issue of **THE INTERIM**, the deadline for comments was Feb. 23.)
- The Northwestern Corporation bankruptcy case. Members will be updated on the current status of this proceeding.

June Meeting Planned in Colstrip...The committee is tentatively planning to meet on June 3 and 4 in Colstrip, Montana. (Readers should note that the date and location are subject to change.) Members are interested in hearing about various initiatives to use Montana's coal resources as well as the status of coal bed natural gas development.

Committee Meets in Great Falls...The committee met in Great Falls on Jan. 29 and 30. Highlights of the meeting included:

- A diverse and knowledgeable group of professionals involved with transmission of electricity described efforts underway and actions necessary to improve the transmission system to better serve Montana.
- A panel of experts discussed the merits of clearly authorizing the default supplier of electricity to own generation assets (facilities that produce electricity), and to include those assets in the rate base and earn a rate of return on the default supply of electricity.
- NorthWestern Energy official Pat Corcoran described the "NorthWestern Energy 2004 Electric Default Supply Resource Planning and Procurement Plan" that was submitted to the Public Service Commission in Jan. 2004. Gerald Mueller described the role of the NorthWestern Energy Technical Advisory Committee and summarized advice given and general observations made by the advisory committee. (Mueller is the facilitator for the group.)

Want to Know More?... A meeting schedule, agendas, meeting materials, and other information are on the committee's website. To get to the website, type "http://leg.mt.gov," click on "Committees," then click on "Interim." Contact Mary Vandenbosch at (406) 444-5367 or mvandenbosch@mt.gov for more information or to be added to a mailing list.

## ENVIRONMENTAL QUALITY COUNCIL

EQC and Subcommittees to Meet in March...The Environmental Quality Council subcommittees will meet in Helena on March 9. Details of the subcommittee meetings are discussed below. The full EQC will meet for a short session on March 9 at 4 p.m. in Room 102 of the state Capitol and on March 10 at 8 a.m.

How High's the Water, Mama?...The EQC will work on state water policy including updates on the Total Maximum Daily Load (TMDL) program and on efforts to deal with the permitting of artificial ponds and a brief review of water laws in other states. The EQC will also consider water banking, the water rights issue of connectivity between surface water and ground water, and funding alternatives to expedite adjudication of water rights claims. The EQC will also review a draft paper on the status of metal mine bonding.

If you have questions or need additional information regarding EQC water policy issues, contact Krista Lee Evans at (406) 444-3957 or kevans@mt.gov

Agency Oversight Subcommittee...The Agency Oversight Subcommittee will meet Tuesday, March 9 from 8 a.m. to 3:30 p.m. in Room 102 of the state Capitol. The Department of Fish, Wildlife, and Parks will discuss: the potential revision of commercial wildlife rules for shooting preserves, game farms, and roadside zoos and menageries; and the rules process for a future bison hunt made possible by recent legislation. The subcommittee will review the implementation of the new \$4 optional vehicle registration fee for the support of state parks.

The Department of Agriculture and the Department of Natural Resources and Conservation will present their compliance and enforcement reports for the past three years as required by law. The subcommittee will review some proposed Department of Environmental Quality rules regarding the land application of septage from septic tanks and pit vaults. In addition, the subcommittee will continue its review of the EQC's specific statutory duties related to the state solid waste plan, the mega-landfill siting requirements, and MEPA document tracking.

For further information on subcommittee activities, contact Larry Mitchell, staff, at (406) 444-1352 or lamitchell@mt.gov.

Energy Policy Subcommittee...The Energy Policy Subcommittee is scheduled to meet March 9 from 8 a.m. to 4 p.m. in Room 137 of the state Capitol. The agenda includes:

- evaluating the barriers and opportunities to the development of renewable energy in Montana;
- analyzing current Montana and federal incentives for renewable energy;
- evaluating renewable energy incentive programs in other states;

- evaluating Montana's ethanol production incentives;
- exploring the feasibility of utilizing the Coal Tax Trust Fund to provide bonding security for renewable energy incentives;
- exploring the possibility of allowing the Board of Investments to directly lend money for renewable energy projects; and
- evaluating opportunities in Montana's current renewable resource grant and loan program for providing incentives to renewable energy projects.

For further information on subcommittee activities, contact Todd Everts, staff, at (406) 444-3747 or [teverts@mt.gov](mailto:teverts@mt.gov)

Information on the Web...Minutes of past meetings, draft meeting agendas, and additional information about the Environmental Quality Council are available on the EQC website at [http://www.leg.mt.gov/css/lepo/2003\\_2004/default.asp](http://www.leg.mt.gov/css/lepo/2003_2004/default.asp), by calling (406) 444-3742, or by emailing [eqc@mt.gov](mailto:eqc@mt.gov).

## SJR 32 SUBCOMMITTEE ON MEDICAL LIABILITY INSURANCE

Subcommittee to Identify Problems and Options...The SJR 32 Subcommittee, created by the Legislative Council and commissioned to study medical liability insurance, met on Jan. 15. After receiving testimony from insurers, medical providers, medical facilities, persons injured as a result of malpractice, and other interested parties, the subcommittee held an executive work session.

The subcommittee's work session resulted in, among other things, directions to staff to compile and list the range of perceived problems and possible solutions from which the members will identify and the staff will compile priorities for further research, analysis, and consideration. The list, which will likely change from time to time, has been distributed to subcommittee members and has been posted to the subcommittee's website for review by stakeholders. Subcommittee members will identify their individual priorities and forward them to staff by the end of February. Staff will compile and summarize the members' combined lists of prioritized options, disseminate the results to members and stakeholders, and post the results to the website.

Next Meeting March 25...The subcommittee's next meeting is scheduled for Thursday, March 25 in Room 137 of the state Capitol. A summary of previous meetings is also available on the subcommittee's website through the agendas and minutes of the meetings. Please check the website periodically for more details of the subcommittee's meetings, past and future. You may also contact Dave Bohyer, subcommittee staff, at

the Legislative Services Division by phone at (406) 444-3064 or by e-mail at [dbohyer@mt.gov](mailto:dbohyer@mt.gov).

## STATE ADMINISTRATION AND VETERANS' AFFAIRS COMMITTEE

Subcommittee to Examine Highway Patrol Recruiting...The State Administration and Veterans' Affairs Interim Committee last met on Jan. 23. Coverage of the meeting is in the February issue of **THE INTERIM**, and additional information is available on the committee's website.

At the January meeting, the Montana Highway Patrol again reported on the continuing, significant challenges in recruiting and retaining qualified candidates for MHP officer positions. Col. Shawn Driscoll, then chief of the MHP (he has recently retired), briefed the committee on pay differentials among MHP officers and local law enforcement officers in various Montana counties. Following Col. Driscoll's presentation, the committee formed a subcommittee to study the problems of recruiting and retaining qualified MHP officers. The members of the subcommittee are: Rep. Stan Fisher, chair; (R-Bigfork); Sen. Kelly Gebhardt (R-Roundup); Rep. Larry Jent (D-Bozeman); and Rep. Ralph Lenhart (D-Glendive).

Chairman Fisher has asked the Montana Department of Justice, of which the MHP is a division, to present a detailed analysis of the issues and a detailed plan of action for consideration by the subcommittee. The subcommittee will meet before the next scheduled meeting of the full committee (June 10 and 11), but a specific date for the subcommittee's meeting has not been set. Updates will be posted periodically to the subcommittee's portion of the committee's website.

For additional information regarding the committee or the subcommittee, contact Dave Bohyer by phone at (406) 444-3064 or by e-mail at [dbohyer@mt.gov](mailto:dbohyer@mt.gov).

## LEGISLATIVE FINANCE COMMITTEE

March Meeting...The Legislative Finance Committee will meet on March 11 and 12 in Room 102 of the state Capitol, beginning at 8:30 a.m. The Legislative Fiscal Division staff and others are tentatively scheduled to present the following:

- a report on 2005 biennium budget spending "pressure points";
- an update on general fund/federal funds;
- an update of wildfire costs and the status of other wildfire-related committee activities;

- an update on certain LFD staff interim work plan projects including the development of a state program inventory and an analysis of the trends of the state government revenue and expenditure base;
- an update on a legal opinion related to the capital projects fund shortfall reported at the last meeting;
- a report on the Information Technology Management Strategic Plan as required by statute, and a report on major information technology projects;
- a report on 2007 biennium budget issues;
- a fiscal update on state assumption of district court costs;
- an update on the status of "Medicaid Redesign";
- an update on TANF and developmental disabilities issues (including the closure of the Eastmont Human Services Center in Glendive); and
- other informational reports.

The agenda and the reports for many of the agenda items are or will be available on the LFD website at <http://www.leg.mt.gov/css/fiscal/lfc.asp> along with other committee information. For further information, contact Clayton Schenck at [cschenck@mt.gov](mailto:cschenck@mt.gov) or at (406) 444-2986. For information regarding specific reports, ask for the analyst who is preparing the report.

## CHILDREN, FAMILIES, HEALTH, AND HUMAN SERVICES COMMITTEE

Committee Reschedules Meeting...The Children, Families, Health, and Human Services Interim Committee will meet April 29 and 30 (rescheduled from March 25 and 26 ) in Helena. The committee will try to wrap up its HJR 3 study on indigent defense for child abuse and neglect proceedings in order to forward a recommendation to the Law and Justice Interim Committee, which is studying the public defender system in Montana. Staff will prepare an issues and options paper for consideration.

The committee will also continue its SJR 11 study on substance abuse prevention, treatment, and control. A proposal is being developed and refined to create greater statewide coordination and leadership in substance abuse prevention. The proposal would change existing agency infrastructure for greater integration and leadership in substance abuse prevention. The committee is also seeking technical assistance on treatment issues including financing treatment and expanding treatment capacity, treatment courts, and treatment for co-occurring disorders.

As part of the committee's agency monitoring duties, the Department of Public Health and Human Services will report on several activities including public health changes, responses to bioterrorism, and administrative rules.

Get Thee to the Web...Materials for the meeting will be available on the committee's website in early April. If you need more information or wish to be placed on the interested persons list, contact Susan Byorth Fox at (406) 444-3597 or [sfox@mt.gov](mailto:sfox@mt.gov).

## LEGISLATIVE COUNCIL

Council to Consider a Wide Variety of Topics at March Meeting...The Legislative Council will meet Friday, March 26 at 8:30 a.m. (tentative) in Room 102 of the state Capitol. Members are scheduled to hear reports on several topics including state revenue collections and expenditures, the activities of the SJR 32 Subcommittee on Medical Liability Insurance, the Board of Regents' economic development proposal, Television Montana (TVMT), recent court challenges to state statutes, new legislator orientation, and legislative rules training. The council will also discuss potential budget proposals for the 2007 biennium and potential legislation for the 2005 session. In addition, members will review proposed changes to the Legislative Council Rules of Procedure relating to bill drafting.

For more information about the Legislative Council, call Lois Menzies at (406) 444-3066 or send an e-mail message to [lomenzies@mt.gov](mailto:lomenzies@mt.gov).

## REVENUE AND TRANSPORTATION COMMITTEE

What's it Worth to Ya?...At its Feb. 13 meeting, the committee looked at a broad spectrum of information on the valuation of electrical generation facilities. Gene Walborn, Department of Revenue, presented a primer on the valuation of electrical generation property. Using a regulated electric utility operating in more than one state as an example, Walborn said that the utility is valued as a single unit taking into account all of its assets, both in-state and out-of-state. The entire system is valued using the cost approach (historical costs less depreciation), income approach (direct capitalization), and market approach (stock and debt or sales of comparable property). Each of these approaches is weighted by the appraiser to come up with a market value of the utility. A portion of the market value is allocated to each state in which the utility operates and that value is then apportioned to taxing jurisdictions. The apportionment of generation property is based on location, and the apportionment of transmission and distribution

property is based on mileage<sup>1</sup>. If the property were sold to another regulated utility, the valuation of the entire system in the first year would be based on the sales price (market approach).

Walborn reminded the committee that property (including electrical generation property) is centrally assessed by the department if the property is physically connected across county or state lines or if the property is operated as a single entity (see 15-23-101, MCA, and ARM 42.22.102). PPL Montana has disputed the department's authority to centrally assess its generation facilities (see the January 2004 issue of **THE INTERIM** for prior coverage).

Bob Hanson, Avista Corporation, reviewed the history of central assessment and unitary valuation of regulated utilities and discussed the relationship between the valuation for property tax purposes and rate regulation. He said that in valuing regulated utility property, the appraiser takes into account the earnings limitation imposed by regulators. He also discussed the differences between the valuation of electric utility property and nonutility electrical generation property. He said that earnings from unregulated electrical generation property are not capped and that the market value of this type of generation property will fluctuate with market conditions.

Jeff Martin, committee staff, summarized a report that described the methods used by several other states to value generation property. The states included in the report use a wide variety of methods to determine the market value of regulated electric utilities and nonregulated electrical generators for property tax purposes. Several states have revised the valuation methods for electrical generation property, regardless of the status of restructuring in the particular state, to account for the evolving structural changes in the electricity supply market. Although California has suspended restructuring, it uses replacement cost new, less depreciation, and a discounted cash flow income method for valuing wholesale generators. Texas uses these methods to value all generation property under a restructured environment, while New York relies primarily on a discounted cash flow income method.

Several states value all generation property. Arizona, New Mexico, and Ohio each provide a statutory method for the valuation of electrical generation property owned by a regulated utility or by a wholesale generator. Oregon assesses regulated utilities on the unitary method and wholesale generation facilities typically as "stand-alone" units using cost, income, and market indicators.

Washington and Oklahoma value regulated utilities on a unitary basis, while wholesale generators are valued locally. The report is available on the committee's website.

Department of Revenue Reports...Larry Finch, for a report required by 15-1-203, MCA, summarized the legislative changes to the charitable endowment tax credit and the amount of the credit claimed by individuals and corporations since 1997. The

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<sup>1</sup>Generation property (except for qualifying facilities) is taxed at 6% of market value and transmission and distribution property (except for electric cooperatives) is taxed at 12% of market value.

total amount of credits claimed by individuals increased from \$1.3 million in 1997 to \$7.5 million in 2001. Senate Bill 15, enacted during the August 2002 special session, temporarily reduced the amount of the credit that could be claimed. As a result, the total amount of credits taken by individuals fell to \$1.7 million in 2002. The total amount of the credit taken by corporations also declined because of SB 15.

Neil Peterson discussed the use of a collection agency to collect income taxes that have been delinquent for a period of time. In response to a request for proposal for providing the service, the department received 17 proposals including one from a Montana firm. The contract was awarded to GC Services, an out-of-state firm.

MDT Turns on the HEAT...The HEAT in Room 102 wasn't coming from a malfunctioning radiator or from a disgruntled constituent. It was coming from the Department of Transportation (MDT), but nobody seemed to mind. That's because this HEAT had nothing to do with temperature or with angry outbursts. It is an acronym for MDT's new Highway Economic Analysis Tool, a demonstration of which was provided to the committee. Members were told that once HEAT is fully functional, the data it produces will be an integral part of MDT's highway construction and maintenance decision-making process.

The impetus for the design of HEAT was HJR 30, passed during the 2001 legislative session and sponsored by then-Representative Story. HJR 30 called for MDT to include economic development criteria in its funding apportionment process. MDT's goals for the HEAT program are to:

- identify which transportation investments will benefit specific Montana industries;
- provide MDT with an analytical method to evaluate economic development impacts of transportation improvements; and
- use the analytical method to quantify the economic impacts of transportation improvement scenarios as part of MDT's planning process.

The committee was shown some of HEAT's features and the kinds of analysis the program can provide. Examples include: a mapping of commodity flows, industry profiles for various Montana-based industries, and a graphic representation of accessibility and drive times from a major city (something that would be of interest to a business considering locating in that city). The committee also learned how HEAT was used to analyze the benefits and costs of the various alternatives under consideration for U.S. Highway 2, an analysis requested by the Reconfiguration Study Steering Committee. More information about the reconfiguration study and HEAT's role in it can be found on MDT's website at <http://www.mdt.mt.gov/research/reconfigstudy/>.

MDT staff stressed that the information generated by HEAT will not be used in a vacuum to determine priorities for road construction and maintenance, but that the data will be considered with a number of other factors, such as safety and traffic volume, when those decisions are made.

A Grim Reminder...In an ongoing effort to keep highway safety on the front burner, MDT Deputy Director Jim Currie distributed the names and ages of the 43 people who died on Montana roads during the months of November and December. This list, a regular feature of MDT's reports to the Committee, indicated that seatbelts were not used in 30 of the 43 fatalities.

Show Me the Money...The evening before the committee's meeting, the U.S. Senate passed its rendition of the highway reauthorization bill, containing \$318 billion in contract authority and \$290 billion in obligation authority for Montana, substantial increases over the amounts that were authorized for the state in TEA-21 when that highway funding bill was enacted in 1998. The House version of reauthorization is not complete and has not yet been acted upon but contains even more spending authority for Montana. The Bush administration has threatened to veto the Senate's version if the spending levels remain the same. Meanwhile, TEA-21, which was scheduled to have expired last September, has been extended through the month of June. MDT credited Montana's congressional delegation for their hard work in securing such a generous highway funding package for the state.

Other Topics...The committee also considered the following:

- the report required by 90-8-311, MCA, on the capital company act;
- an update on the "tax incentive" payment for the production of alcohol to be blended for gasohol;
- progress reports from the Tax Reform Study Committee and the Property Reappraisal Study Committee;
- a review of the property taxation of business equipment (see next month's issue of **THE INTERIM** for more details);
- background reports on the corporation license tax and on congressional action dealing with the taxation of Internet access;
- a review of Department of Revenue rules.

Next Meeting in April...The Revenue and Transportation Committee will meet April 30 in Helena. For more information about the committee, its work plan, or agendas, please visit the website (<http://www.leg.mt.gov>) and follow the "Committees" links), or contact Jeff Martin at (406) 444-3595 or [jmartin@mt.gov](mailto:jmartin@mt.gov) or Leanne Kurtz at (406) 444-3064 or [lekurtz@mt.gov](mailto:lekurtz@mt.gov).

## ECONOMIC AFFAIRS COMMITTEE

Committee to Review Occupational Disease and Business Funding...

The Economic Affairs Committee will meet March 11 at 8:30 a.m. in Room 137 of the Capitol. The committee will learn about the relationship of occupational disease to workers compensation court cases and will hear from businesses about how the state can assist business expansion. Separate working groups of interested parties have developed information for each part of the agenda. Insurers, attorneys, and labor representatives have proposed options for incorporating Supreme Court decisions into workers' compensation statutes. Representatives from venture fund companies and other investors have worked with business people and economic development officers to develop ideas on how the state can best assist businesses to grow and expand. For more information about the meeting, please visit the committee's website under <http://leg.mt.gov/css/default.asp> and follow the links through Interims, 2003-2004, to the Economic Affairs Committee. Or call Pat Murdo, committee staff, at (406) 444-3594.

## LAW AND JUSTICE COMMITTEE

Committee to Consider Whether to Revamp Public Defender System...

The Law and Justice Interim Committee will meet in Livingston, Montana, on Saturday, March 20, to examine public defender issues and discuss whether the Legislature should enact a statewide public defender system.

The public defender system is currently administered by the counties, but the state pays the costs of the system through a combination of reimbursements and direct payments. Five counties (Missoula, Cascade, Gallatin, Deer Lodge, and Yellowstone) have established county public defender offices. The other counties contract for public defender services or use public defenders appointed by the court on a case-by-case basis.

The committee will consider a variety of options ranging from the status quo to the enactment of a full-fledged state public defender agency along with an analysis of the pros and cons of each option and the fiscal implications of each option. The committee has invited representatives from a few states to discuss how those states structure and fund their systems. The committee has also invited public defenders, county attorneys, and judges to present their perspectives, concerns, and recommendations.

Following the presentations, the committee will discuss each option and will decide on which option to pursue.

The agenda and meeting place has not been finalized. For more information, contact Sheri Heffelfinger at (406) 444-3596 or browse the committee's website accessible through [www.leg.mt.gov](http://www.leg.mt.gov).

TIME AND TIDE	
<u>Event</u>	<u>Days remaining</u>
Target date for completion of interim committee work (September 15, 2004)	199
General election (November 2, 2004)	247
59th Legislature convenes (January 3, 2005)	309

THE BACK PAGE

ONE RINGY-DINGY TOO MANY?  
NEW DEVELOPMENTS DESIGNED TO REDUCE UNWANTED PHONE  
CALLS AND FAXES

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**INTRODUCTION**

Technology has advanced significantly since the days when Lily Tomlin drawled "one ringy-dingy, two ringy-dingy" as she played Ernestine the telephone operator on Rowan and Martin's "Laugh-In." Those were the days when I could get in touch with my friends by spinning the dial on the rotary phone and leaving a message to call me at Lakeview x-xxxx or by heading out to the alley to see if anyone was around.

As a result of significant advances in technology, it has become much easier for "ET" to phone home, with or without wires. Furthermore, we can send images and messages virtually instantaneously. And whether or not the message is wanted, others can send information to us at what seems like supersonic speed.

This article addresses new developments regarding regulating *unwanted* commercial telemarketing calls and facsimile (fax) transmission, as well as certain prohibited telemarketing practices.

Keen interest in this topic was demonstrated during the 2003 legislative session. Six bills were introduced: three bills would have established a do-call or do-not-call list; one addressed unwanted faxes; and two were focused on telemarketing practices. Two bills were approved by the Legislature and signed by the Governor: House Bill No. 424, sponsored by Rep. Larry Jent, which established a state do-not-call list; and House Bill No. 637, sponsored by Rep. Holly Raser, which prohibited faxing of unsolicited advertisements.

Regulation of these activities involves, in simplistic terms, a determination of the appropriate balance between constitutional rights: the right to communicate and the right to be "let alone"<sup>a</sup> -- the right to privacy. The appropriate location of the balance beam is a matter of dispute, and litigation abounds. Consequently, the regulatory mechanisms described in this article are subject to change. Resources for additional or updated information are included, and the reader is encouraged to consult these resources.

### FEDERAL REGULATION OF TELEPHONE SOLICITATION

Since 1991, the U.S. Congress has approved at least four laws that address telemarketing. These include the following:

- Telephone Consumer Protection Act of 1991;<sup>b</sup>
- Telemarketing and Consumer Fraud and Abuse Prevention Act (1994);<sup>c</sup>
- Do-Not-Call Implementation Act (2003);<sup>d</sup> and
- National Do-Not-Call-Registry (2003).<sup>e</sup>

Undoubtedly reflecting concerns raised by its constituents, when Congress enacted the Telephone Consumer Protection Act, it found, among other things, that "Many customers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers." In 1994, Congress found that it was necessary to enact legislation to offer consumers protection from telemarketing deception and abuse. Many states followed suit.

### NATIONAL DO-NOT-CALL REGISTRY ESTABLISHED

Pursuant to these laws, the Federal Trade Commission and the Federal Communications Commission (FCC) have adopted rules and jointly established a national do-not-call list. Significantly, the FCC asserts that its telemarketing rules apply without exception to any entity engaged in any of the telemarketing activities targeted by the Telephone Consumer Protection Act and the FCC's related rules, including those that involve purely *intrastate* activities.

Under the federal rules, residential subscribers who do not want to be called by telemarketers have two options:

- Register a phone number on the national do-not-call list. Regulated telemarketers are prohibited from calling phone numbers on the list for a commercial purpose. (Exemptions are described below.) A consumer who wants to receive calls from certain businesses can authorize those calls in writing and still exclude other calls.<sup>1</sup>
- Block calls from certain telemarketers by requesting that the telemarketer place the consumer on a company- or organization-specific do-not-call list. This option applies to some telemarketers that are exempt from compliance with the national do-not-call registry requirements.

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<sup>1</sup>For example, in "Mercedes Benz," Janis Joplin sang of her conviction that "Dialing for Dollars" was searching to find her. Assuming that "Dialing for Dollars" was subject to the law, Joplin could register for the do-not-call registry and provide written authorization for "Dialing for Dollars" to call her. Using this approach, her phone would be freed up so that Joplin could win the jackpot.

Telemarketers are required to obtain the national list and updates at least quarterly. A fee is charged based on the number of area codes requested. To purchase the list for more than five area codes, the cost is \$25 a year for each area code, with a maximum annual fee of \$7,375 for the entire U.S. database. There is no charge to obtain the list for five or fewer area codes.

The following are exempt from the prohibition on telephone solicitation unless the resident has asked to be placed on the company-specific do-not-call list:

- calls to residential telephone subscribers with an established business relationship;
- calls to residential subscribers who have granted prior express permission to be contacted;
- tax-exempt nonprofit organizations and independent telemarketers calling on behalf of such organizations;<sup>2</sup> and
- calls to persons with whom the marketer has a personal relationship.

### RESPONSE FROM TELEMARKETERS

During the Federal Trade Commission's rulemaking proceeding, industry commenters raised the prospect of dire economic consequences. Individual sellers and telemarketing firms estimated that they might have to lay off up to 50 percent of their employees if the registry were to go into effect.<sup>1</sup> Following an FCC vote to establish a do-not-call registry, the American Teleservices Association issued a news release entitled "FCC Votes to Eliminate Two Million Jobs."

Four lawsuits were filed against the federal government. Initially, two federal judges prohibited the federal government from enforcing the requirements. However, the U.S. Court of Appeals for the 10th circuit overturned these decisions, and the federal agencies were allowed to enforce the requirements pending appeal. The four cases were consolidated and heard by the 10th Circuit Court on November 10, 2003.<sup>9</sup> On February 17, 2004, the court held that "the do-not-call registry is a valid commercial speech regulation because it directly advances the government's important interests in safeguarding personal privacy and reducing the danger of telemarketing abuse without burdening an excessive amount of speech." Representatives of telemarketing associations remain concerned about the federal do-not-call regulations.

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<sup>2</sup>The Federal Trade Commission regulations require tax-exempt organizations to maintain a company-specific list; the FCC regulations do not. Some organizations will voluntarily honor a residential subscriber's request.



The primary issue in these lawsuits is whether or not the balancing of first amendment<sup>3</sup> and privacy interests was appropriate. Furthermore, the October 31, 2003, brief for Mainstream Marketing Services, Inc., et al., and U.S. Security, et al., states that "the government assumed incorrectly that some speakers 'have rights that others don't.'"

#### **MONTANA'S DO-NOT-CALL PROGRAM**

Montana law requires the Department of Administration to adopt rules and have a do-not-call database in operation by January 1, 2004. The Department has adopted its rules and has elected to use the national do-not-call list for its database. The national list is available to states at no charge.

Federal law and rules establish the minimum do-not-call requirements. Montana law comes into play when it is more stringent and the call is an intrastate call. A significant difference between the two laws is the exemption for tax-exempt organizations. To qualify for the exemption in Montana, a bona fide member of the exempt organization must make the communication.

#### **PROHIBITED TELEMARKETING PRACTICES**

Selected telemarketing practices that are prohibited by federal or state law, or both, include the following:

- Calling before 8 a.m. or after 9 p.m.
- Automated telephone solicitation using various devices to play recorded messages. Montana law<sup>h</sup> is broad with narrow exemptions. For example, it is illegal to gather data or promote a political campaign using a recorded message.
- Failing to identify the telemarketing firm making the call.
- Interfering with caller identification. The telemarketer must provide a telephone number that can be used to make a do-not-call request during regular business hours.

#### **UNWANTED FAXES**

The 2003 Montana Legislature approved a law that prohibited transmission of unsolicited advertisements to a fax machine and provided an exemption for public safety. The FCC also strengthened its rules governing unwanted faxes. Specifically, the rules prohibit sending an unsolicited advertisement to a fax machine without the prior written permission of the recipient of the advertisement. The FCC rules now specifically

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<sup>3</sup>Among others, the first amendment to the U.S. Constitution includes rights to freedom of speech and freedom of the press.

address "fax broadcasters" -- entities that transmit advertisements for others to a large number of fax machines for a fee.

#### **RESOURCES**

To register or remove your phone number from the National Do-Not-Call list, call 1-888-382-1222 or 1-866-290-4236 for TTY.<sup>4</sup> You can also register via the Internet at [www.donotcall.gov](http://www.donotcall.gov).

More information about the National Do-Not-Call program can be viewed at <http://www.fcc.gov/cgb/donotcall>.

Information about Montana's Do-Not-Call Program, unwanted faxes, and other telecommunications practices is available from the Montana Consumer Protection Office at (406) 444-4500.

Information about unwanted faxes and other issues related to telecommunications practices is available at [http://www.fcc.gov/cgb/information\\_directory.html](http://www.fcc.gov/cgb/information_directory.html) or 1-888-225-5322 (1-888-835-5322 for TTY).

#### **ENDNOTES**

- a. Rowan v. United States Post Office Department, 397 U.S. 728 (1970)
- b. P.L. 102-243, codified at 47 U.S.C. § 227
- c. 15 U.S.C. §§ 6101-6108
- d. P.L. 108-10
- e. P.L. 108-82
- f. Federal Trade Commission Telemarketing Sales Rule; Final Amended Rule (Federal Register Vol. 68, No. 19, Wednesday, January 29, 2003) at 4631
- g. Docket Nos. 03-1429, 03-6258, 03-9571, and 03-9594
- h. 45-8-216, MCA

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<sup>4</sup>Teletypewriter for communicating with deaf persons using telecommunications systems.



## INTERIM CALENDAR

UNLESS OTHERWISE SPECIFIED,  
ALL ROOM DESIGNATIONS ARE IN THE CAPITOL BLDG.

### MARCH

March 5, State-Tribal Relations Committee, Room 137, 10 a.m.

March 9, EQC Energy Policy Subcommittee, Room 137, 8 a.m.

March 9, EQC Agency Oversight Subcommittee, Room 102, 8 a.m.

March 9, Environmental Quality Council, Room 102, 4 p.m.

March 10, Environmental Quality Council, Room 102, 8 a.m.

March 11, Economic Affairs Committee, Room 137, 8:30 a.m.

March 11, Legislative Finance Committee, Room 102, 8:30 a.m.

March 12, Legislative Finance Committee, Room 102, 8:30 a.m.

March 16, K-12 Education Working Group on Health Insurance, Room 102, 9 a.m.

March 20, Law and Justice Committee (rescheduled from March 18), Livingston, Montana

March 23, Legislative Audit Committee, Room 102

March 25, SJR 32 Subcommittee on Medical Liability Insurance, Room 137

March 25, Energy and Telecommunications Committee, Room 102

March 26, Legislative Council, Room 102, 8:30 a.m.

### APRIL

April 2, Local Government Subcommittee

April 2, K-12 Education Subcommittee, Room 137

April 29 and 30, Children, Families, Health, and Human Services Committee (rescheduled from March 25 and 26), Room 102

April 30, Revenue and Transportation Committee, Room 137